(29,836)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 526

HENRY MERRITT, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1923

[fol. 1] IN THE

COURT OF CLAIMS

No. C-56

HENRY MERRITT, Claimant,

vs.

THE UNITED STATES.

I. PETITION—Filed March 8, 1923

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States:

The petition of the claimant, Henry Merritt, respectfully represents:

1. That he is a citizen of the United States, a resident of the City of Webster, State of Massachusetts, and is there engaged in the manufacture of cloth under the name of the Merritt Woolen Company; that he is the sole owner of the claim hereinafter stated, no part of which has ever been paid, sold, assigned, aliened or discharged.

2. That on or about the 23d day of July, 1918, he entered into a contract with the Panama Knitting Mills Company of New York for the furnishing of approximately 15,000 yards of 6/4 Khaki cloth at $3.20 per yard, according to specifications, which cloth was to be used in the manufacture of puttees for the United States Army, under a contract the said Panama Knitting Mills Company had with the War Department of the United States, which claimant is informed, was numbered 3581-N; that thereafter the United States through the War Department suspended the contract under which claimant was working.

[fol. 2] 3. Section 1 of the Act of Congress of March 2, 1919 (40 Stat. 1272) known as the Dent Act, provides in part as follows:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials or supplies, or for services, or for facilities, or other

purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

4. That thereafter the Secretary of War proceeded to determine and settle the liability of the United States to claimant and the said Panama Knitting Mills Company, the prime contractor as aforesaid, under the contract aforesaid, under the provisions of the aforesaid Act of March, 1919, and did order claimant to deliver for the use of the United States, at the contract price of $3.20 per yard as aforesaid, and which claimant did, 7,442⅞ yards of the said Khaki cloth, for which the War Department paid to the Panama Knitting Mills Company for the account of claimant, $3.20 per yard or $23,-[fol. 3] 817.20 plus $597.19 carrying charges for the five months said cloth had been held by claimant for delivery awaiting adjustment, which settlement claimant is informed was,—Cancellation Agreement, B-148, dated June 23, 1919, Purchase Section War Department Claims Board.

5. That notwithstanding the receipt for the account of claimant as aforesaid, of the contract price of said cloth or $3.20 per yard, and which was unknown to claimant, at that time, the Panama Knitting Mills Company, informed claimant, that the Secretary of War had only allowed $2.50 per yard for the said cloth, that is the 7,442⅞ yards, and that he was compelling all contractors to take some loss in their settlements, and upon such fraudulent representation procured release from claimant for the said cloth, at the rate of $2.50 per yard plus the carrying charges of $597.19.

6. That when the aforesaid acts of the Panama Knitting Mills Company became known, the War Department enforced and exacted from the said Panama Knitting Mills Company a return of the difference in the settlement between it and the settlement the Panama Knitting Mills had with claimant, or viz, the sum of $5,210.02. which money though demanded by claimant, the War Department refused and still refuses to pay claimant, and turned it into the Treasury of the United States, by the sanction and approval of the Secretary.

7. The aforesaid release of the Panama Knitting Mills Company being procured by fraud and being based upon no consideration, claimant, for cause of action herein, says there is due and owing to [fol. 4] him from the United States on account of the premises, the sum of $5,210.02, exclusive of all counterclaims, and just defense on the part of the United States.

8. That claimant has at all times borne true allegiance to the government of the United States and has never taken part in rebellion or insurrection against it.

9. That Section 2 of said Dent Act provides:

"That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, corporation or company shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section."

Wherefore claimant prays judgment against the United States in the sum of $5,210.02, and for all proper relief in the premises.

Henry Merritt, Claimant. Perkins & Widmayer, Attorneys for Claimant.

[fols. 5 & 6] Jurat showing the foregoing was duly sworn to by Henry Merritt omitted in printing.

[fols. 7 & 8] [Title omitted]

II. DEMURRER—Filed April 10, 1923

Defendant demurs to the petition in this case for the reason that it fails to state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. C. M. Nash, W. F. Norris, Special Assistants to the Attorney General.

III. ARGUMENT AND SUBMISSION OF DEMURRER—April 30, 1923

Submitted on demurrer without argument by Mr. W. F. Norris for defendant, and argued and submitted by Mr. L. A. Widmayer for plaintiff.

[fols. 9 & 10] [Title omitted]

IV. ORDER SUSTAINING DEMURRER—Decided May 7, 1923

This cause coming on to be heard was submitted upon the demurrer to the petition. On consideration whereof, the court is of the opinion that the demurrer is well taken. It is therefore adjudged and ordered that the defendant's demurrer to the plaintiff's petition be, and it is hereby, sustained and the petition is dismissed.

Memorandum

(1) The facts averred do not show a contract, express or implied, between plaintiff and the United States.

(2) It appears that the Government paid the prime contractor the price for the goods delivered and if the prime contractor imposed [fols. 11 & 12] upon plaintiff, that fact does not give a cause of action against the defendants.

[Title omitted]

V. Application for and Order Allowing Appeal—Filed July 3, 1923

From the judgment rendered in the above-entitled cause on the 14th day of May 1923, in favor of the defendant, plaintiff, by his attorney, makes application for and gives notice of an appeal to the Supreme Court of the United States.

L. B. Perkins, L. A. Widmayer, Attorneys for Plaintiff.

Ordered: That the above appeal be allowed as prayed for.

By the Court. August 2, 1923.

Clerk's Certificate

I, J. Bradley Tanner, Chief Clerk, Court of Claims, certify that [fol. 13] the foregoing are true transcripts of the pleading in the above-entitled cause; of the demurrer; the argument and submission of the case on demurrer; order sustaining demurrer; memorandum of the Court thereon; and application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, D. C., this 14th day of August, A. D. 1923.

J. Bradley Tanner, Chief Clerk Court of Claims. G. E. D.

[Seal of the Court of Claims.]

Endorsed on cover: File No. 29,836. Court of Claims. Term No. 526. Henry Merritt, appellant, vs. The United States. Filed August 28th, 1923. File No. 29,836.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 526.

HENRY MERRITT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

Statement of Facts.

The Court of Claims sustained a demurrer filed by the United States to the petition of the plaintiff therein and rendered the following opinion, in part:

> "1. The facts averred to do not show a contract, express or implied, between the plaintiff and the United States.

"2. It appears that the Government paid the prime contractor the price for the goods delivered, and if the prime contractor imposed upon plaintiff that fact does not give a cause of action against the defendants."

ARGUMENT.

The first ground is advanced by the Court below and the demurrer sustained *and the facts are not before the court,* although the petition alleges in paragraph 4—

> "that thereafter the Secretary of War proceeded to determine and settle the liability of the United States to claimant and the said Panama Knitting Mills Company, the prime contractor as aforesaid, under the contract aforesaid, under the provisions of the aforesaid Act of March 2, 1919, and did order claimant to deliver for the use of the United States, at the contract price of $3.20 per yard as aforesaid and which claimant did, 7,442⅞ yards of the said khaki cloth, for which the War Department paid to the Panama Knitting Mills Company for the account of claimant, $3.20 per yard or $23,817.20 plus $579.19 carrying charges for the five months, said cloth having been held by claimant for delivery awaiting adjustment, which settlement claimant is informed was Cancellation Agreement B-148, dated June 23, 1919, Purchase Section, War Department Claims Board."

The order for and the delivery of the goods was after the old or prime contract had been suspended. (See paragraph 3 of the petition.) When the War Department ordered claimant to deliver the goods he had on hand, as alleged in paragraph 4 of the petition, above set out, although he had been a subcontractor before, there was a new and an origi-

nal contract, which was completed by the delivery of the goods. Delivery of the goods was made by claimant, as he was instructed by the War Department, DIRECT TO THE UNITED STATES, and the facts will show, as alleged in paragraph 4 of the petition, that the goods were delivered "FOR THE USE OF THE UNITED STATES." The price was fixed and agreed upon by claimant and the War Department, and the contract was complete with the delivery of the goods. There was nothing more that claimant could do.

The Act of March 2, 1919 (40 Stat., 1272), in section 4, provides that before payment could be made to a prime contractor for the account of any subcontractor, and this act was the authority under which the War Department was adjusting or settling these claims and contracts, the consent of the ascertained subcontractor should be first had and obtained. By common consent of the parties and for the convenience of the Government, the old prime contractor, the Panama Knitting Mills Company, out of whose contract and the cancellation thereof the new one with claimant was made, was designated the agency through whom payment would be made.

Claimant had a good cause of action against the paying agent until the Government intermeddled and took, for no reason and without consideration or right, the money or fruit of the fraud of the paying agent, the Panama Knitting Mills Company. The action of the Government gives claimant the right of redress against it under both the general jurisdiction of the Court of Claims and the aforesaid Act of March 2, 1919, because such action amounts to a failure of payment by the Government to claimant for the goods delivered as agreed. Surely the Government cannot contend

that there are any rights it can be subrogated to under the fraud of the paying agent on claimant, who has "at all times borne true allegiance to the Government of the United States" (paragraph 8 of the petition).

This Court has said:

> "The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. May *vs.* Le Claire, 11 Wall., 217; Taylor *et al. vs.* Plummer, 3 Mau. & Sel., 562," * * * "But surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party." U. S. *vs.* State Bank, 96 U. S., 30, 35, and 36.

The Congress charged the Secretary of War and the Court of Claims that in determining or settling or adjusting claims under the said Act of March 2, 1919, to do so upon a "fair and equitable basis," and this duty cannot be escaped.

The United States is liable for the value thereof when it takes or accepts goods at an agreed price, as it did in this case, no matter what happens before or after the taking or acceptance, when no fraud or injury has been done to the United States.

Respectfully submitted,

L. B. PERKINS,
L. A. WIDMAYER,
Attorneys for Henry Merritt, Plaintiff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 159.

HENRY MERRITT, APPELLANT,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

L. A. WIDMAYER,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 159.

HENRY MERRITT, APPELLANT,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

The United States contends that no cause of action has been set up by the facts stated in appellant's petition, and that the demurrer of the Government should be sustained.

The petition alleges that the Secretary of War ordered appellant, the subcontractor, to furnish and deliver for the use of the United States 7,442⅞ yards of khaki cloth; that the appellant did actually so furnish and deliver said yardage *for the use of the United States;* that the United States then paid the prime contractor for said cloth at the rate of $3.20

per yard, or $23,817.20 plus $597.19 carrying charges for the five months said cloth had been held by appellant for delivery; that the original contractor falsely stated to appellant that the United States had paid him only at the rate of $2.50 per yard for said cloth furnished by appellant, and appellant accepted this sum because of the false representations of the original contractor to that effect; that thereafter the United States learned of the original contractor's action and required it to refund the amount not paid over to the subcontractor, which amount was covered into the Treasury; that under the contract between appellant and the original contractor the said original contractor agreed to pay appellant $3.20 per yard for the cloth so furnished.

The above-stated facts are admitted by the demurrer. Their admission establishes, as a matter of law, an implied contract and that the United States now holds in trust for appellant the sum of $5,210.02 (70 cents per yard) repaid said United States by the original contractor. This sum was exacted from the original contractor by the United States because of its fraud upon appellant and because of its failure to pay over said sum to appellant in accordance with the contract. The facts pleaded in the petition and restated *supra* incontestably show that money has been paid into the Treasury which legally belongs to appellant, and that the United States holds it merely as trustee. To continue to hold it would make the United States a party to the fraud in disregard of the principles laid down by this Court in the case of United States *vs.* State Bank, 96 U. S., 30, and also in Haupt *vs.* Horovitz, 120 S. E. (Ga.), 425; 27 Cyc., 857, 864; 2 Rul. Case Law, 778; Gaines *vs.* Miller, 111 U. S., 395; Ra-

borg *vs.* Peyton, 2 Wheat., 385; Leete *vs.* Pacific Mill Co., 88 Fed., 957; Metropolis Bank *vs.* Jersey City First Nat. Bk., 19 Fed., 301.

Respectfully submitted,

L. A. WIDMAYER.

In the Supreme Court of the United States

OCTOBER TERM, 1924

HENRY MERRITT, APPELLANT
v.
THE UNITED STATES
No. 159

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The appellant filed his petition in the Court of Claims, seeking to recover the sum of $5,210.02. A demurrer was filed by the United States, and from the decree of the Court of Claims sustaining the demurrer and dismissing his petition the claimant has appealed to this Court.

The petiton alleges that the appellant, Merritt, is a citizen of the United States, residing at Webster, Massachusetts, where he was engaged in the manufacture of cloth. On or about July 23, 1918, Merritt entered into a contract with the Panama Knitting Mills Company for the furnishing of approximately 15,000 yards of 6/4 Khaki cloth, at $3.20 per yard, according to specifications, which cloth was to be used in the manufacture of puttees for the United

States Army, under a contract the said Panama Mills had with the United States War Department, which contract was numbered 3581–N. Neither contract is set forth in the body of the petition, nor appended thereto as an exhibit. The claimant alleges that the United States, through the War Department, "suspended the contract under which the claimant was working."

After reciting section 1 of the act of Congress approved March 2, 1919 (40 Stat. 1272), known as the Dent Act, the petition proceeds to allege that "thereafter the Secretary of War proceeded to determine and settle the liability of the United States to claimant" (appellant) "and the said Panama Knitting Mills Company, the prime contractor as aforesaid, under the contract aforesaid, under the provisions of the aforesaid act of March 2, 1919, and did order claimant to deliver for the use of the United States, at the contract price of $3.20 per yard as aforesaid, and which claimant did, 7,442⅞ yards of the said Khaki cloth, for which the War Department paid to the Panama Knitting Mills Company for the account of claimant, $3.20 per yard, or $23,817.20 plus $597.19 carrying charges for the five months said cloth had been held by claimant for delivery awaiting adjustment, which settlement claimant is informed was Cancellation Agreement, B–148, dated June 23, 1919, Purchase Section, War Department Claims Board." The petition does not set forth, either in the body thereof or as an appendix, any part or all of the said cancellation agreement.

The petition avers that the claimant did not know at the time that the Government had paid to the Panama Mills the sum of $3.20 per yard for said Khaki cloth; that the Panama Mills nevertheless informed claimant that the Secretary of War had only allowed $2.50 per yard for the said cloth, to wit, 7,442⅞ yards, and that the Secretary was "compelling all contractors to take some loss in their settlements, and upon such fraudulent representation procured release from claimant for the said cloth, at the rate of $2.50 per yard plus the carrying charges of $597.19."

When the War Department learned of the aforesaid acts of the Panama Mills, it "enforced and exacted from the said Panama Mills a return of the difference in the settlement between it and the settlement the Panama Mills had with claimant, or viz, the sum of $5,210.02, which money though demanded by claimant," the War Department refuses to pay to him.

The claimant avers that the release of the Panama Knitting Mills Company was procured by fraud, and was based on no consideration, and on that account claims that the United States owes him the amount for which he brings his suit, to wit, $5,210.02. The petition concludes with the quotation of section 2 of the said Dent Act.

The Court of Claims sustained the Government's demurrer, on the grounds that:

(1) The facts averred do not show a contract, express or implied, between the plaintiff and the United States.

(2) It appears that the Government paid the prime contractor the price for the goods delivered, and if the prime contractor imposed upon plaintiff, that fact does not give a cause of action against the defendant.

ARGUMENT

In the presentation of his case, the claimant elected to take the hazardous course of filing a petition which consisted largely of conclusions of law, instead of statements of fact. A demurrer does not admit anything but facts well-pleaded. Mere averments of legal conclusions are not admitted by demurrer unless the facts and circumstances set forth are sufficient to sustain such averments.

Horsford v. *Gudger*, 35 Fed. 388.

Dennison Mfg. Co. v. *Thomas Mfg. Co.*, 94 Fed. 651.

Three contracts in writing are specifically referred to in the petition. None of said contracts are appended to the petition, and none of them are quoted from, the claimant relying on conclusions of law which he avers arise from the contracts which he has withheld from the scrutiny of the Court. He has ignored the mandatory and wise provisions of Rule 17 of the Court of Claims, which is as follows:

> If the claim be founded upon an express contract with the United States, the substance of such contract must be set forth in the petition, and, if it be in writing, the original or a copy must be annexed thereto. If it be founded upon an implied contract, the facts upon which the claimant relies to prove a

> contract must be specified. If it consists of several matters or items, each must be separately stated.

The recurrence of the word "must" indicates that the Court of Claims regards compliance with this rule as mandatory. True, the claimant's petition was not dismissed on the ground that he failed to comply with said Rule 17, but because, having elected to ignore the rule, he nevertheless failed to set forth a cause of action cognizable in the Court of Claims.

A careful reading of the petition seems to indicate that the claimant relies on the Dent Act, and also on the fraud committed by the Panama Mills in representing to him that it received only $2.50 per yard for the Khaki cloth in question, instead of $3.20 as provided in the cancellation agreement between the Panama Mills and the War Department. To this cancellation agreement, according to the petition, the claimant was not a party. Fraud committed by the Panama Mills certainly does not give the claimant a cause of action against the Government, and we shall dismiss this contention without further comment or argument.

Is this, then, a claim under the provisions of the Act of March 2, 1919 (40 Stat. 1272), known as the Dent Act? The appellant seems to have reached some doubt, because in his brief in this Court he for the first time advances the contention that the cause of action is cognizable not only under the Dent Act but also under the general jurisdiction of the Court of Claims.

The contract between claimant and the Panama Mills, dated July 28, 1918, to which the Government was obviously not a party, provided for the delivery by claimant to said Panama Mills of 15,000 yards of Khaki cloth, at $3.20 per yard.

Contract 3581–N, between the War Department and said Panama Mills, provided for manufacture and delivery by said mills to the Government of certain puttees for the use of the Army. It is to be noted that the date of said contract is not given in the petition. Neither is the date mentioned in the petition on which the claimant contends that the War Department "suspended the contract under which the claimant was working." The only contract "under which the claimant was working" was its contract with the Panama Mills. Where, when, and how did the War Department "suspend" said contract? The claimant contents himself with a bald statement of a legal conclusion. However, let us draw the most favorable inference to the claimant, and conclude that the suspension referred to means a suspension of operations under the contract 3581–N between the War Department and the Panama Mills, and that this suspension affected the claimant in continuing his manufacture and delivery of the cloth to the Panama Mills, under his contract with said Panama Mills.

Treating the claimant as a subcontractor, let us ascertain his rights under the Dent Act, if he has any, that he may prosecute in the Court of Claims.

The relief provided by said act is intended to be accorded contractors whose contracts with the Government have not been executed in the manner provided by law. The Secretary of War, in considering claims brought by contractors, is given the authority by section 4 of the act to require the prime contractor to present satisfactory evidence of having paid his subcontractor, or of the consent of the subcontractor to look for his compensation to said prime contractor; this failing, the Secretary shall pay directly to the subcontractor the amount found to be due him under the award. The subcontractor, however, must have entered into his contract with the prime contractor "with the knowledge and approval of any agent of the Secretary of War duly authorized thereto."

One scans the petition in vain to find any averment that the War Department, through any agent duly authorized thereto, either knew or approved of the contract entered into between the claimant and the Panama Mills for the furnishing by the former to the latter of the Khaki cloth to be fabricated by the Panama Mills into puttees for the War Department. Nor is there any allegation that the subcontractor presented his claim, in which event, however, the Secretary of War could have done one of the following things only: either pay the entire award to the prime contractor, satisfied with his evidence that the subcontractor would look to him for compensation, or pay direct to the subcontractor such amount as would be found due him under the award.

The petition avers instead that the Secretary of War ordered the claimant to deliver to the Panama Mills a reduced quantity of the cloth at the price of $3.20 per yard, with which order the claimant complied. The Secretary, instead of making a Dent Act award, entered into Cancellation Agreement B–148, with the Panama Mills, and entered into a new contract with the claimant, according to the petition. The appellant's brief (p. 2) states:

> The order for and the delivery of the goods was after the old or prime contract had been suspended. (See paragraph 3 of the petition.) When the War Department ordered claimant to deliver the goods he had on hand, as alleged in paragraph 4 of the petition, above set out, although he had been a subcontractor before, there was a new and an original contract, which was completed by the delivery of the goods.

This is an apparent, though belated, abandonment of the theory that his right to recover is founded on the Dent Act. Suffice it to say, in closing this phase of the argument, that if it is the new contract on which the claimant bases his cause of action, that contract was obviously made later than November 12, 1918, and therefore the Court of Claims had no jurisdiction under the Dent Act.

The appellant argues that the "order" by the War Department to deliver the reduced quantity of Khaki cloth to the Panama Mills "for the use of the United States," followed by such delivery, fixes the Govern-

ment's liability. It is hardly to be presumed that any Court will regard a mere statement of a legal conclusion as sufficient to establish the agency of the Panama Mills.

> By common consent of the parties [says Appellant, p. 3 of his brief] and for the convenience of the Government, the old prime contractor, the Panama Knitting Mills Company, out of whose contract and the cancellation thereof the new one with claimant was made, was designated the agency through whom payment would be made.

If this surprising statement be based on any facts, these facts must be found in the Cancellation Agreement B–148, which the claimant pleads without disclosing as required by the rules of the Court of Claims. The entire presentation of this case, by both sides, must necessarily be based largely on surmise, because of the refusal of the claimant to set forth in his petition enough facts to advise the Court as to what the controversy is all about. The very physical structure of paragraph 4 of the petition, for example, is so involved that it is impossible, even with the aid of the appellant's cryptic brief, to ascertain whether the contract on which the claimant sues is or is not incorporated in the said cancellation agreement itself. If so, the agreement is the only and the best evidence of its contents. If the "order" of the War Department was not contained in said Cancellation Agreement, we are not advised as to whether it was in writing, by whom made, or as to any of the circum-

stances from which the very existence of any contract could be inferred.

In short, the claimant has failed utterly to present a claim that constitutes a cause of action, and the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.
ROSCOE R. KOCH,
Special Assistant to the Attorney General.

OCTOBER, 1924.

○

MERRITT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 159. Argued January 5, 1925.—Decided March 2, 1925.

1. Action by a sub-contractor in the Court of Claims, *held* not maintainable under the Dent Act, §§ 1 and 4, the petition not showing an agreement with the plaintiff entered into by or under authority of the Secretary of War, or performed, etc., prior to November 12, 1918, or a claim presented before June 30, 1919, or that, before a payment was made by the Government to the prime contractor, the plaintiff had made expenditures, etc., "with the knowledge or approval of any agent of the Secretary of War duly authorized thereunto." P. 340.
2. Where a contractor, upon settling with the Government under the Dent Act, induced the claimant to release his sub-contract for less than was due him by fraudulently misrepresenting to him the basis upon which the settlement was made, and the Government, learning this, exacted a repayment to itself from the contractor of of an amount equal to that of which the claimant had thus been defrauded, but it did not appear that the exaction was for the claimant's benefit, *held*, that the claimant had no cause of action to recover this amount from the United States under the Tucker Act, since the United States was under no express contract to pay the claimant and none was to be implied in fact. P. 340.
3. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Id.*
4. The practice of the Court of Claims does not allow a general statement of claim in analogy to the common counts, but requires

a plain, concise statement of the facts relied on, not leaving the defendant in doubt as to what must be met. P. 341.

58 Ct. Clms. 371 affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition on demurrer.

Mr. L. B. Perkins for appellant, submitted. *Mr. L. A. Widmayer* was also on the briefs.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. Roscoe R. Koch,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In July, 1918, or earlier, the United States contracted with the Panama Knitting Mills for a quantity of khaki at $3.20 a yard. In June, 1919, this contract was cancelled by a new agreement between the Government and the Mills, made pursuant to the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. Under the cancellation agreement the Government adjusted its liability by accepting delivery of half of the khaki originally contracted for, paying the contract rate together with the carrying charges. The Mills had a sub-contract with the plaintiff for the supply of the khaki. By falsely representing that the Government compelled settlement on the basis of $2.50 a yard plus the carrying charges, the Mills induced the plaintiff to release it, on that basis, from the sub-contract. When the Government learned of the fraud thus perpetrated, it exacted from the Mills a repayment of $5,210.02—the difference between the amount actually paid by the Government and what would have been paid if settlement had been made on the basis of $2.50 a yard.

This suit was brought in March, 1923, to recover from the United States the sum so repaid. The Court of Claims dismissed the petition on demurrer for failure to state a cause of action. The case is here on appeal under § 242 of the Judicial Code.

Plaintiff cannot recover under the Dent Act. There are three obstacles. It does not appear, as required by § 1, that, prior to November 12, 1918, an agreement with the plaintiff, express or implied, was entered into by the Secretary of War, or "by any officer or agent acting under his authority, direction, or instruction, or that of the President." *Baltimore & Ohio R. R. Co.* v. *United States*, 261 U. S. 385; *Baltimore & Ohio R. R. Co.* v. *United States*, 261 U. S. 592. It does not appear, as required by § 1, that any such agreement had been "performed . . , or expenditures . . made or obligations incurred upon the faith of the same . . prior to" November 12, 1918. *Price Fire & Water Proofing Co.* v. *United States*, 261 U. S. 179, 183. It does not appear, as required by § 1, that the claim sued on was presented before June 30, 1919. The Dent Act affords relief although there is no agreement "executed in the manner prescribed by law," but only under the conditions stated. The plaintiff is not helped by § 4 which deals with sub-contracts; among other reasons, because it does not appear, as therein prescribed, that, before the payment made by the Government to the prime contractor, the plaintiff had "made expenditures, incurred obligations, rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto."

Plaintiff cannot recover under the Tucker Act, Judicial Code, § 145, 24 Stat. 505. The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the latter for the khaki on

any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received. But no facts are alleged which afford any basis for a claim that the repayment made by the Mills was exacted by the Government for the benefit of the plaintiff. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581. For aught that appears repayment was compelled solely for the benefit of the Government, under the proviso in § 1 of the Dent Act, which authorizes recovery of money paid under a settlement, if it has been defrauded.

The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling* v. *United States,* 23 Ct. Clms. 361; *The Atlantic Works* v. *United States,* 46 Ct. Clms. 57, 61; *New Jersey Foundry & Machine Co.* v. *United States,* 49 Ct. Clms. 235; *United States* v. *Stratton,* 88 Fed. 54, 59.

Affirmed.